

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 2013

**Diane M. Fremgen
Clerk of Court of Appeals**

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP938

Cir. Ct. No. 2012CV1201

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

A TO Z MACHINE CO., INC.,

PLAINTIFF,

V.

ELITE TACTICAL ADVANTAGE, INC. AND STEPHEN MARK MUELLER,

DEFENDANTS,

ELITE TACTICAL ADVANTAGE,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT,

V.

**A TO Z FIREARMS, LLC, DALE SKOVERA, MICHAEL SCOTT VOET,
DAVE REITER AND GERALD VAN HANDEL,**

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Elite Tactical Advantage (ETA) appeals a judgment and order dismissing its counterclaim against A to Z Machine Co., Inc. (A to Z Machine) and its third-party complaint against Dale Skovera, Michael Scott Voet, Dave Reiter, Gerald Van Handel, and A to Z Firearms, LLC (collectively, A to Z Firearms). Although ETA asserts the court somehow erred, it fails to develop any cognizable argument. We affirm.

BACKGROUND

¶2 A to Z Machine sued ETA to recover on unpaid invoices and obtain compensation for equipment it had purchased solely to manufacture parts for ETA. After answering the complaint, ETA counterclaimed against A to Z Machine and filed a third-party complaint against A to Z Firearms. A to Z Machine subsequently moved to dismiss ETA's counterclaim and third-party complaint.

¶3 The motion alleged ETA, a foreign corporation, was transacting business in Wisconsin without holding a certificate of authority, in violation of WIS. STAT. § 180.1501(1).¹ A to Z Machine contended that, pursuant to WIS. STAT. § 180.1502(1), ETA therefore could not maintain any court proceeding in the state. The motion observed, however, that § 180.1502(3) granted the court authority to stay the proceedings.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 On the day of the motion hearing, ETA filed a letter brief. ETA conceded it was a foreign corporation, and it did not refute the claim that it was transacting business in Wisconsin. ETA represented it had now filed an application for a certificate of authority.² It also emphasized that the court's authority to stay the proceedings under WIS. STAT. § 180.1502(3) was discretionary, because the statute used the term "may." ETA argued, "Given the language of the statute, we respectfully submit that a stay by the court is discretionary and not mandatory. By virtue of the pending application of [ETA] for a certificate of authority, a stay at this time is not warranted under the circumstances." ETA then concluded its letter brief asserting, "In any event, the dismissal relief requested ... is not supported in any manner by [WIS. STAT. ch. 180]."

¶5 The court granted A to Z Machine's motion to dismiss, explaining:

I do find based upon the status of this file and the proofs presented through the briefs and arguments today that the Wyoming corporation, [ETA], a foreign corporation, does indeed conduct intrastate business in the state of Wisconsin. They are clearly transacting business in the state of Wisconsin as noted by the maintenance of an office in Appleton, of real estate that is used for general corporate purposes in the state of Wisconsin, local contracts in the past that are evidenced by this lawsuit and that continue right up through today.

I find that as such they are required to obtain a Wisconsin certificate of authority. They do not have such a certificate. Therefore, they cannot bring suit in the state of Wisconsin or in the courts of Wisconsin as a matter of law. I must therefore, dismiss [ETA]'s counterclaim and third-party complaint, which I do at this time.

² At the motion hearing, ETA's counsel indicated that "my client has submitted just this week an application for certificate of authority."

ETA now appeals.³

DISCUSSION

¶6 ETA states:

The issue for appellate review is whether a circuit court is required, as a matter of law, to dismiss the counterclaim and the third-party complaint of a foreign corporation which is a party to a state court action if the court determines that foreign corporation is required to obtain a certificate of authority under WIS. STAT. § 180.1501 and does not hold such a certificate of authority under WIS. STAT. § 180.1502.

However, the actual basis of ETA's appeal is not entirely clear.

¶7 One thing is clear; ETA is not challenging the circuit court's determinations that ETA was conducting business in Wisconsin and that ETA, therefore, was subject to the WIS. STAT. § 180.1501(1) requirement to obtain a certificate of authority.⁴ ETA concedes, "This appeal does not involve the question of whether ... [ETA] needed to obtain a certificate of authority" With that concession in place, we turn our focus to WIS. STAT. § 180.1502(1), which provides: "A foreign corporation transacting business in this state without a certificate of authority ... may not maintain a proceeding in any court in this state until it obtains a certificate of authority." The failure to obtain a certificate,

³ ETA represents that it has now obtained a certificate of authority. We disregard this assertion. The assertion is supported only by citation to documents ETA included in its appendix, but which are not part of the record on appeal.

⁴ WISCONSIN STAT. § 180.1501(1) provides: "A foreign corporation may not transact business in this state until it obtains a certificate of authority from the department."

however, does not prevent a foreign corporation from defending a civil suit. *See* WIS. STAT. § 180.1502(4).

¶8 ETA commences its argument by discussing, at length, activities that do not constitute a foreign corporation transacting business in this state. Given ETA’s concession that it was required to obtain a certificate of authority, we fail to see the relevance of this portion of ETA’s argument.

¶9 ETA’s next argument, consisting of a single paragraph, is that it was entitled to present its counterclaim and third-party complaint as part of its permitted defense of A to Z Machine’s underlying suit. This argument is neither developed nor supported by citation to relevant legal authority. We therefore do not consider it. *See State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (“We will not decide issues that are not, or inadequately, briefed.”). Additionally, ETA failed to present any such argument in the circuit court. Accordingly, it forfeited its right to present the argument on appeal. *See State v. Huebner*, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727.

¶10 ETA next addresses the circuit court’s WIS. STAT. § 180.1502(3) discretionary authority to stay a proceeding until a foreign corporation obtains a certificate of authority. ETA asserts “a discretionary stay [was] a ‘worst case’ option under the facts presented in this case.” In ETA’s statement of facts, it represents that its letter brief asserted “that a discretionary stay of the proceedings by the court would be the appropriate course of action until the issuance of the certificate of authority.” As set forth above, ETA misrepresents the record. ETA’s letter brief explicitly requested that the court *not* issue a stay. Aside from its assertion that a stay was an appropriate “worst case” option, ETA does not assert, much less develop any argument, that the court erroneously exercised its

discretion by not granting a stay. We reject ETA’s argument as undeveloped. *See Flynn*, 190 Wis. 2d at 39 n.2.

¶11 ETA next argues the “corporate statutes do not mention or in any manner provide for dismissal as a matter of law under such circumstances in this case involving [ETA]. The circuit court erred in dismissing the counterclaim and third-party complaint” This argument is undeveloped. *See id.* In any event, WIS. STAT. § 180.1502(1) provides that a foreign corporation without a requisite certificate of authority cannot maintain a suit in Wisconsin. Thus, the circuit court had no option but to stay the proceedings under § 180.1502(3), or dismiss. ETA does not argue the court erroneously exercised its discretion in not issuing a stay. Thus, the only remaining option was to dismiss.

¶12 Finally, ETA essentially restates its argument—rejected above—that its counterclaim and third-party complaint were merely responsive pleadings in support of its defense of A to Z Machine’s suit, and were therefore permitted under WIS. STAT. § 180.1502(4). ETA commences this argument by criticizing the circuit court for “not address[ing] these issues in its dismissal determination.” As we observed above, ETA did not present any such argument to the circuit court. ETA therefore forfeited its right to raise the issue on appeal. *See Huebner*, 235 Wis.2d 486, ¶¶10-12. In any event, ETA’s argument would fail on the merits. As explained in A to Z Machine’s brief, counterclaims and third-party

complaints are not responsive pleadings; they are affirmative pleadings alleging causes of action.⁵

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

⁵ A to Z Machine further argues that ETA's counterclaims and third-party claims were unrelated to the underlying suit and, therefore, did not constitute compulsory claims. ETA disagrees in its reply, speculating that the claims may have been compulsory and that it may be precluded, under various legal principles, from renewing its claims after obtaining a certificate of authority. These are matters that should have been addressed first in the circuit court, not raised for the first time in ETA's appellate reply brief.

